U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 February 2006

BALCA Case No.: **2005-INA-00009**
ETA Case No.: P2004-NY-02503564

In the Matter of:

LAWRENCE WEINSTEIN,
and
TONI ALBANESE,
Employer,

on behalf of

DIANNE RAMLAL,
Alien.

Appearance: Robert Frank[1]
Frank & York, LLC
Newark, New Jersey
For the Employer and the Alien

Charles D. Raymond and Carrie Kamler
U.S. Department of Labor, Office of the Solicitor
Washington, D.C.
For the Certifying Officer

Deborah J. Notkin
Barst & Mukamal, LLP
New York, New York
For Amicus, *American Immigration Lawyers Association*

Before: **Burke, Chapman, Huddleston, Vittone, and Wood**
Administrative Law Judges

[1] Mr. Frank did not file an *en banc* brief.

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) (the Act), and Title 20, Part 656 of the Code of Federal Regulations.[2] On April 12, 2001, the Employer applied for permanent labor certification on behalf of the Alien for the position of "Live-In Housekeeper." A United States Department of Labor Certifying Officer (CO) denied the Employer's application on May 13, 2004. Thereafter, the Employer filed a Request for Review before the Board of Alien Labor Certification Appeals (Board), in which the Employer challenged the CO's determination and the Board's longstanding rule, as first enunciated in *Roger and Denny Phelps*, 1998-INA-214 (May 31, 1989) (*en banc*) (hereinafter "*Phelps*"), that an employer seeking to employ a live-in Household Domestic Service Worker may not establish the one year of experience requirements of 20 C.F.R. §§ 656.21(a)(3)(iii) and 656.11(26) through employment in the same job with the sponsoring employer.

By Order dated July 13, 2005, the Board, *sua sponte*, granted *en banc* review of the instant matter. Specifically, we advised the parties that we would revisit our decision in *Phelps* and consider whether an employer may satisfy the one-year-of-experience requirement under Section 656.21(a)(3)(iii) with documentation of the alien's experience with the sponsoring employer, and whether the CO properly denied labor certification in this case. The Board invited the American Immigration Lawyers Association (AILA) and the American Immigration Law Foundation to participate as *amicus curiae*. *See* 29 C.F.R. § 18.12. On September 27, 2005, AILA submitted its Brief of *Amicus Curiae*. On September 28, 2005, the Office of the Solicitor,

[2] The application in the instant matter was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

United States Department of Labor, submitted the Certifying Officer's Brief *En Banc*. Upon review of the parties' arguments, the Appeal File (AF), and relevant precedent, we reaffirm the Board's decision in *Phelps* and, thereby, affirm the CO's denial of labor certification in this matter.

DISCUSSION

On May 31, 1989—more than sixteen years ago—the Board issued a Decision and Order in *Phelps*, which specifically addressed the application of Section 656.21(a)(3)(iii). In evaluating the alien's previous experience as a household domestic service worker under Section 656.21(a)(3)(iii), the Board granted *en banc* review and affirmed the CO's denial of certification, holding that the alien's prior six years of paid experience as a domestic household worker with her father-in-law did not satisfy the one-year of paid experience requirement under 20 C.F.R. § 656.21(a)(3)(iii) because a familial relationship does not constitute a bona fide employer-employee relationship. *Phelps*, 1988-INA-214, slip op. at 2, fn. 3 citing the Employment and Training Administration's Technical Assistance Guide (TAG) No. 656, p. 43, 9/81. The Board held further that the alien's subsequent 18 months of experience with the sponsoring employer could also not satisfy the one-year requirement under Section 656.21(a)(3)(iii).[3]

Since 1989, Panels of the Board have applied the *Phelps* rule five times (as recent as 2004), and on one occasion, the Board reviewed the issue *en banc*. *See Angelina Mongiove*, 2002-INA-267 (Mar. 2, 2004); *Marc & Suzanne Wachtel*, 1996-INA-57 (Oct. 29, 1997); *Ofelia Balmaseda, M.D.*, 1994-INA-411 (Oct. 12, 1995); *Marvin and Ilene Gleicher*, 1993-INA-3 (Oct. 29, 1993) (*en banc*); *Mark and Andrea Smith*, 1990-INA-178 (Jan. 19, 1993); *Greg A. Lindquist*, 1991-INA-345 (Dec. 16, 1992). In *Gleicher*, the *En Banc* Board unanimously upheld the *Phelps* rule without a single concurring opinion. Specifically, we noted in *Gleicher* that "it is logical that the one-year paid experience requirement is designed to demonstrate that the Alien is tied to this occupation," and concluded then that "there is less assurance that the Alien has a reasonable attachment to the occupation when the one-year experience purportedly supporting such

[3] It is this portion of the *Phelps* decision that is at issue in the instant matter and is the focus of our inquiry. Therefore, throughout the remainder of this Decision this portion of *Phelps* will be referred to as the "*Phelps* rule" for simplicity.

attachment is gained in whole or in part with the petitioning Employer." *Gleicher*, 1993-INA-3, slip op. at 3-4. Thus, we held:

> Given the purpose of listing jobs under Schedule B, and the consistent application of *Phelps* by the Board since 1989 with no change in the applicable regulations by the Secretary, we reaffirm the holding in *Phelps* and decline to permit exclusion from Schedule B, or in the case of a live-in job waiver from Schedule B, for household domestic service worker jobs unless the alien has one year of full-time paid experience with employers other than the petitioning employer.

Id. at 4.

There is no question that the Board has consistently applied and affirmed the *Phelps* rule since 1989. The Employer and *amicus curiae*, however, now urge the Board to overturn 16 years of established precedent and credit the Alien's experience with the sponsoring employer for purposes of Section 656.21(a)(3)(iii). Upon consideration of our previous rulings and the parties' arguments in light of principles of stare decisis, we once again uphold our ruling in *Phelps*.

The Supreme Court has stated clearly and consistently that although stare decisis is a "principle of policy," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) and not an "inexorable command," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), "any departure from the doctrine of stare decisis demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). More importantly, in the area of statutory and regulatory interpretation, "the burden borne by the party advocating the abandonment of an established precedent is greater" than in other cases such as those involving constitutional interpretation since the legislature is free to amend statutory language in response to a previous ruling. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (In which the Supreme Court stated further: "Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); *see also Crawford & Sons*, 2001-INA-121 (Jan. 9, 2004) (*en banc*) ("[W]e must be mindful that stare decisis 'is at its most powerful in statutory interpretation

which Congress is always free to supersede with new legislation."). As the Board has noted in the past, "[s]tare decisis reaches not only Congress, but the general public as well." *Crawford & Sons*, 2001-INA-121. Thus, "[s]tare decisis has added force when the legislature in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, when overruling a decision would dislodge settled rights and expectations or require an extensive legislative response." *Id. citing Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

In light of these principles of stare decisis, we note that in *Gleicher* the Department of Labor took a position opposite to that which it now presents and urged the Board to overrule *Phelps*, and to provide that an alien's one year of paid experience with a sponsoring employer should be sufficient to fully satisfy Section 656.21(a)(3)(iii). The Board unanimously declined to overrule *Phelps*. *Gleicher*, 1993-INA-3. The DOL's position in the instant matter—that the *Phelps* rule should be sustained—suggests that the Department of Labor, and in particular the ETA, has come to rely on our previous rulings related to Section 656.21(a)(3)(iii) in evaluating applications for permanent labor certification. Moreover, it is significant, as we noted in *Gleicher*, that the Secretary—having ample opportunity to do so—has not amended the language of Section 656.21(a)(3)(iii) in response to our rulings in *Phelps* or *Gleicher*.[4] Given that Congress has introduced no legislation and no new rulemaking procedures have been undertaken to supersede our decisions in *Phelps* and *Gleicher*, we find that the *Phelps* rule is established law and no special justification exists to overcome principles of stare decisis in this matter.

Based on the foregoing, we affirm the rule first enunciated in *Phelps*, that an employer may not establish an alien's one year of paid experience as a household domestic service worker under Section 656.21(a)(3)(iii) with documentation of experience obtained with a sponsoring employer. Because the relevant factual circumstances of the instant matter are virtually identical

[4] Although this application was filed prior to the effective date of the PERM regulations, *see* footnote 2 *supra*, we find it significant that the regulatory provision at issue here, 20 C.F.R. § 656.21(a)(3)(iii) (2004), remains unchanged under PERM as well, *see* 20 C.F.R. § 656.19(b)(3) (2005). In addition, the PERM preamble notes that "[s]ome commenters suggested maintaining the requirement in the current regulations for live-in domestic workers to have at least 1 year of work experience with someone other than the employer-applicant." 69 Fed. Reg. 77358 (Dec. 27, 2004). After considering these comments, the Secretary decided not to amend the regulation provision at issue. As noted, the CO has taken the position before us that the *Phelps* rule interpreting this regulation should be retained.

to those in *Phelps* and *Gleicher*, the *Phelps* rule controls. Accordingly, we **AFFIRM** the CO's denial of labor certification.

SO ORDERED.

A

John M. Vittone
Chief Administrative Law Judge

Administrative Law Judge Linda S. Chapman, Dissenting:

In acquiescing to the status quo, the majority has declined the opportunity to correct a misapplication of the law that has persisted for over sixteen years, and that will continue to affect those without a powerful voice for change. The majority does not offer any defense of its stance, other than the rationale that its ruling in *Phelps* has been consistently applied and affirmed since 1989, and thus the principles of *stare decisis* should be observed. Unfortunately, that is the only possible rationale, and it does not stand up to even casual scrutiny.

In its decision in *Phelps*, the Board considered two distinct issues regarding the prior experience requirements for live-in household domestic service workers seeking permanent labor certification. The Board first reviewed the issue of whether an alien's previous six years of paid experience as a domestic household worker with her father-in-law satisfied the one year of paid experience requirement under 20 C.F.R. § 656.21(a)(3)(iii). The Board concluded that "the familial relationship is controlling," reasoning that a *bona fide* employer-employee relationship "is necessary in order to demonstrate that the alien is indeed an experienced domestic with the requisite abilities to perform domestic work in a manner satisfactory by market standards." The Board concluded that, because the nature of domestic household work is unique, in that the

employee works in a household setting with the employer, it would be "relatively easy…for duties performed as part of the familial relationship to masquerade as bona fide 'arms length' domestic service experience." Thus, the Board did not deem services performed in the course of a familial relationship, even if monetarily compensated, to be the equivalent of services performed with a non-family member. The Board affirmed the CO's determination because a *bona fide* employer-employee relationship cannot, for purposes of Section 656.21(a)(3)(iii), include a familial relationship between an employer and the alien.

That particular issue, which was discussed at length by the Board in *Phelps*, is not presented in this case. The issue that is presented here was addressed by the Board in *Phelps* in the final paragraph of its decision: whether the alien's previous 18 months of experience with the sponsoring employer satisfied the requirements of Section 656.21(a)(3)(iii). The totality of the Board's discussion is as follows:

> The alien may not establish the one year requirement, or other requirements, through employment in the same job with the Employer/Sponsor. Cf. In the Matter of Apartment Management Co., [19]88-INA-215 (February 2, 1989). Otherwise, an alien who does not, at the time of hiring by the Employer, satisfy the criteria necessary to avoid a Schedule B denial or waiver, is bootstrapped at the unfair expense of other qualified workers into meeting the criteria. Therefore, we find that the Employer has failed to establish the one year of paid employment experience required by section 656.21(a)(3)(iii) and 656.11(b)(26).

Phelps, 1988-INA-214, slip op. at 3.

As Administrative Law Judge Jeffrey Tureck pointed out in his dissenting opinion, it obviously would be unfair for an employer to require experience of job applicants that it did not require of the alien, and this practice is prohibited by Section 656.21(b)(5).[5] In other words, if the alien had gained the three months' experience required of U.S. applicants with the employer, that experience requirement would be invalidated under subsection (b)(5). But the experience requirement at issue here is not the same experience requirement under Section 656.21(b)(5).

[5] At the time of the decision in *Phelps,* this section was numbered Section 656.21(b)(6); it is now numbered as Section 656.21(b)(5).

Indeed, as Judge Tureck pointed out, the one year experience requirement of Section 656.11(b)(26) serves a different purpose: it is meant to assure that the alien knows the demands unique to household domestic service work, has some attachment to the occupation, and will likely continue working in the occupation after arrival. Clearly, for this purpose, it makes absolutely no difference whether this experience was gained with the Employer seeking certification, or with a previous employer.

It is important to note that the Board in *Phelps* confused the distinction between these two experience requirements. Thus, in ruling that the alien could not establish the one year requirement of Section 656.21(a)(3)(iii) through employment in the same job with the employer/sponsor, the Board relied on *Apartment Management*, reasoning that to rule otherwise would bootstrap the alien at the unfair expense of other qualified workers into meeting the criteria.

In *Apartment Management*, however, the issue was whether an alien could satisfy the **actual minimum requirements** for a job offered through employment with the sponsoring employer. The Board in that case held that Section 656.21(b)(6), now Section 656.21(b)(5), did not permit an alien to gain that minimum experience necessary to secure a job with the sponsoring employer. But the Board made no mention of, and clearly did not consider, the application of Section 656.21(a)(3)(iii), which is significant, because the two sections serve vastly different purposes.

As required by Section 656.21(b)(5), an employer must state and advertise accurately and completely the actual minimum requirements for the position so that, *inter alia*, the CO may ascertain whether the alien was qualified at the time he or she was hired by the employer. The purpose of this section is to ensure that an employer does not treat the alien more favorably than it would a U.S. worker. Thus, an employer must submit documentation establishing that the alien qualifies for the position based solely on his/her experience gained with another entity. If not, it is presumed that the employer is circumventing the fair testing of the U.S. labor market by providing the alien with the requisite training and experience without providing the same opportunity to U.S. workers.

But as noted above, the purpose of Section 656.21(a)(3)(iii) is to prevent the alien from receiving labor certification without assurance that she is committed to the occupation, understands the unique demands of live-in, domestic service, and intends to continue working in the occupation. In no way does Section 656.21(a)(3)(iii) relate to the actual minimum requirements for the position. Indeed, the Board in *Phelps*, in a footnote citing to the TAG, stated:

> "This one year paid experience requirement in no way relates to the minimum training and/or experience required to perform the duties of household domestic service worker and should not be shown by the employer as a requirement for the job opportunity." (TAG No. 656, p. 43, 9/81). We agree. The one year experience requirement in Section 656.21(a)(3)(iii) is a requirement for the alien to avoid automatic denial or the need for a waiver of Schedule B. It is not a minimum job requirement for recruiting U.S. workers.

Phelps, 1988-INA-214, *slip op*. at 4, n. 3.

In examining the practical application of Section 656.21(a)(3)(iii), the flaw in the Board's reasoning in *Phelps*, and its mistaken reliance on *Apartment Management*, is apparent. Unlike actual minimum job requirements under Section 656.21(b)(5), the one-year requirement under Section 656.21(a)(3)(iii) does not apply to U.S. workers; therefore, aliens are not "bootstrapped" at the expense of U.S. workers. This distinction is important, because the one year of paid experience requirement under Section 656.21(a)(3)(iii) is not a prerequisite for employment that if made available only to the alien, places U.S. workers at a disadvantage. In fact, **it is only applicable to aliens**. For example, if an employer posts a position for live-in Household Domestic Service Worker, requiring 3 months of relevant experience, a U.S. worker with 3 months of relevant experience is presumably qualified. But an alien applying for the position must not only satisfy the requirement of 3 months of relevant experience, she must also prove that she has one year of full time, paid experience under Section 656.21(a)(3)(iii). The U.S. worker with 3 months of experience does not have to establish this one year of full time paid experience.

The Board revisited this issue in the *Gleicher* decision, in which it reaffirmed the holding in *Phelps*, and declined to permit exclusion from Schedule B, or in the case of a live-in job

waiver from Schedule B, for household domestic service worker jobs unless the alien had one year of full time paid experience with employers other than the petitioning employer. The Board stated that it was logical that the one year paid experience requirement was designed to demonstrate that the alien is tied to the occupation, as stated in the TAG. The Board reasoned that there was less assurance that the alien had a reasonable attachment to the occupation when the one year of experience supporting such attachment was gained in whole or in part with the petitioning employer. The Board stated:

> Experience with the petitioning Employer, gained prior to labor certification while the Alien normally is in something other than a legal permanent resident status, provides insufficient assurance that the Alien would have a continuing attachment to the occupation. The amicus curiae's view that experience with a petitioning employer at least equally serves to acquaint an alien with the special demands of a household service worker job misses the point. It is not knowledge of the job, but assurance an alien really seeks permanent status to remain in such a job, which the one-year experience requirement, necessary to justify an exception to Schedule B, seeks to foster.

Gleicher at 3-4. This strained attempt to affirm the conclusory ruling in *Phelps*, and to justify continuing reliance on that ruling, is also seriously flawed. The TAG, in plain language, focuses on the alien's time spent in the occupation in determining the alien's level of commitment to the occupation. The determining factor set out in the TAG is a bright line test: whether the alien has at least one year of paid experience in the position, with past or present employers. The TAG does not distinguish between experience for employers other than the sponsor, and experience with the sponsor. Indeed, for purposes of this subsection, such a distinction would not make sense: it is difficult, if not impossible, to articulate a difference between the actual work performed for a sponsoring and a non-sponsoring employer.

Indeed, it appears that the Board in *Gleicher*, in attempting to justify continued reliance on *Phelps*, shifted the focus away from the **alien's** time spent in the occupation in determining the alien's level of commitment, and focused on the **employer**, concluding that the employer's status determined the extent of the alien's commitment to the occupation. Thus, the Board implied that by virtue of being a sponsoring employer, an employer somehow polluted the application, with no explanation as to exactly how a sponsoring employer tarnishes the process.

But questions about the *bona fides* of the job being offered, or the legitimacy of the employer's motives for applying for certification are covered by other provisions in Part 656, which operate to preclude certification. *See* 20 C.F.R.§ 656.20(c)(8); *see also Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). Neither the TAG nor the regulation compel the conclusion that the sponsoring employer must lose in all cases, regardless of how much time and commitment the alien has devoted to the household domestic service worker occupation. Section 656.21(a)(3)(iii) operates to ensure that the alien is actually seeking employment as a household domestic service worker. As the TAG makes clear, the one year of experience requirement of this section relates directly to the alien's time spent in the occupation, not to the employer's status or the employer's motives for seeking certification.

In establishing the *Phelps* rule, the Board did not examine the plain language of Section 656.21(a)(3)(iii). This rule does not explicitly state, as argued by the CO, that the documentation necessary to establish one year of relevant paid experience must come from a non-sponsoring employer. The term "non-sponsoring" does not appear in the express language of the Act, the regulation, or the Technical Assistance Guide. Instead, the regulation plainly states that an employer must provide "Documentation of the alien's paid experience in the form of statements from past or present employers" that establishes one full year of relevant work experience. The Board's rejection in *Gleicher* of any reading of "present employer" that "necessarily include[es] a petitioning employer" defies any reasonable interpretation of the plain language of the provision, or any recognized canon of statutory and regulatory interpretation.

Indeed, had the Secretary, in drafting the regulations, intended to preclude experience with a sponsoring employer from being credited for purposes of Section 656.21(a)(3)(iii), he or she could have easily done so with clear language.[6] The DOL argues that the Secretary intended the provision to implicitly include the term "non-sponsoring" as a modifier to the phrase "present

[6] The portion of the preamble to the new PERM regulations, relied on by the majority to suggest that the Secretary somehow ratified the *Phelps* rule in connection with the new PERM regulations is, to say the least, open to interpretation. *See* fn. 4. As set out by the majority, the preamble states that the Secretary "agree[d] with the commenters who proposed live-in domestic workers should have at least 1 year of paid experience in the occupation," and "retained this requirement in the final rule." This does not inexorably lead to the conclusion, as the majority appears to suggest, to agreement that the one year of work experience must be with someone other than the employer-applicant.

employers." But such a divination of the Secretary's intentions appears to have come from whole cloth.

Traditional principles of statutory and regulatory interpretation instruct that in the absence of an express definition, a term is to be construed in accordance with its ordinary or natural meaning. *See, e.g., Smith v. United States*, 508 U.S. 223, 228 (1993). Webster's Dictionary defines the adjective "present" as "now existing or in progress." Webster's Third New International Dictionary, Unabridged 1793 (Philip Babcock Gove, Ph.D. ed., Merriam-Webster 1986). "Employer" is defined as "one that employs something or somebody, as a (1) the owner of an enterprise." *Ibid*. at 743. Thus, in simplest terms, any basic reading of "present employer" in the context of Part 656 includes any person or entity for which the alien currently works, regardless of the employer's status as sponsoring or non-sponsoring. The Board's strained attempt in *Gleicher* to justify the gloss on the regulations announced in *Phelps* is illogical: while the term "present employers" does not "necessarily include a petitioning employer," it does not follow that this phrase automatically excludes a petitioning employer.

In arguing that the term "non-sponsoring" is implied, the DOL relies on a concept about which there appears to be no disagreement: that Section 656.21(a)(3)(iii) seeks to assure that the alien worker is committed to the occupation, in an attempt to discourage fraudulent certification applications. Thus, this Section is meant to prevent an alien from receiving labor certification without assurance that she is committed to the occupation, understands the unique demands of live-in, domestic service, and intends to continue working in the occupation.

The majority does not address any of these considerations in its summary opinion, nor does it address any of the arguments raised by the Employer, or the amicus curiae, who were specifically invited to submit argument. Rather, the majority takes the path of least resistance, and falls back on the doctrine of *stare decisis*, a rationale that rings hollow in this particular case.

Within the realm of American jurisprudence – whether at the state, federal, or administrative level – the rule of law is prized as a controlling and stabilizing authority. "[O]f fundamental importance to the rule of law" is the doctrine of *stare decisis*, *Welch v Texas Dept. of Highways and Public Transportation,* 483 U.S. 468, 494 (1987), which operates to serve the

interests of "the evenhanded, predictable, and consistent development of legal principles, . . . reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

Stare decisis is defined in Black's Law Dictionary as "The doctrine of precedent, under which it is necessary for courts to follow earlier judicial decisions when the same points arise again in litigation." Black's Law Dictionary 1414 (7th ed., West 1999). While the definition appears on its face to be one admiring a tenet of strict adherence, the Supreme Court has treated it as a "principle of policy," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), and not as an "inexorable command," *Payne*, 501 U.S. at 828. Thus, the Supreme Court has reexamined its previous holdings with "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992). For example, the Court has asked

> Whether the rule has proven to be intolerable simply in defying practical workability, *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, *e.g., United States v. Title Ins. & Trust Co*., 265 U.S. 472, 486 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, *see Patterson v., McLean Credit Union*, 491 U.S., 164, 173-174 (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification*, e.g., Burnet* [*v. Coronado Oil & Gas Co*., 285 U.S., 393, 412] (1932) (Brandeis, J., dissenting).

Id. at 854-855. In addition, the Court has found it appropriate to overrule "badly reasoned" or "wrongly decided" decisions. *Payne*, 501 U.S. at 827, 830. Regardless of the rationale offered for overturning past decisions, the Supreme Court has stated clearly and consistently that "any departure from the doctrine of stare decisis demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

In this case, the fact that *Phelps* has been the established law for 16 years is not reason, in and of itself, to uphold the ill-conceived rule enunciated therein. Similar to the Supreme Court's

"constitutional watch," the Board's obligation to decide cases under the Act and its implementing regulations, and to ensure that those decisions are legally sound, does "not cease merely because we have spoken before on an issue." *Planned Parenthood v. Casey*, 505 U.S. 833, 955 (1992) (Rehnquist, J., dissenting) *citing West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

The fact that the Department has changed its initial position and now, after sixteen years of operating under the *Phelps* rule, advocates maintaining the status quo, is hardly surprising, nor should it be given the deference ascribed by the majority. Interpretation of the regulations is ultimately the Board's responsibility. Nor is the majority's reliance on the fact that Congress has introduced no legislation and no rulemaking procedures have been undertaken to supersede the *Phelps* rule particularly persuasive, considering that those who are adversely affected by this interpretation – aliens seeking certification for employment in the United States – would not be expected to have a powerful voice in the process. Nowhere is there the suggestion that overruling *Phelps* would dislodge "settled rights and expectations, or require an extensive legislative response."

Indeed, this case presents an example of the absurd result of the majority's reasoning. The Alien in this case worked for the sponsoring Employer as a household domestic service worker for three years before the Employer filed its application for labor certification. There is no indication that the Employer or the Alien filed this application with fraudulent intentions. Yet the majority's reasoning impugns the Alien's commitment to the **occupation** simply because her experience was gained with the Employer. This result is patently illogical, and contrary to the plain language of Section 656.21(a)(3)(iii).

In hewing to the status quo, in my view, the Board has sidestepped its obligations as the Court of last resort. I believe that the majority's decision is a disservice to the aliens who have worked as household domestic service workers for at least a year, and thus meet the regulatory requirements, but are nonetheless ineligible for certification because they had the poor judgment to perform that work for the sponsoring employer.